(3)

No. 89-390

In the Supreme Court of the United States

October Term, 1989

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

v.

THE LTV CORPORATION, LTV STEEL COMPANY, INC., OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, SUBCOMMITTEE OF PARENT CREDITORS OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, LTV BANK GROUP, OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS, BANCTEXAS DALLAS, N.A., FIFTH THIRD BANK, HUNTINGTON NATIONAL BANK, CITIBANK, N.A., DAVID H. MILLER, and WILLIAM W. SHAFFER,
Respondents.

Response of Respondents David H. Miller and William W. Shaffer in Support of PBGC's Petition For A Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Respondents Miller and Shaffer are plan participants in the Jones and Laughlin Retirement Plan. Miller and Shaffer intervened in the PBGC's enforcement action on behalf of a class of plan participants[1] to support the restoration of that pension plan. Miller and Shaffer agree with the PBGC that the decision of the court of appeals should be reviewed.

SUMMARY OF ARGUMENT

The PBGC in its petition has conveyed the importance of review for the future administration of the termination insurance system. Review is equally important to the intended beneficiaries of ERISA, the plan participants. The decision of the Court of Appeals directly affects the statutory protections accorded plan participants. Rather than remaining true to the Congressional purposes, the Court of Appeals departs from them and elevates bankrupt employers to a favored status that is without a statutory basis. Because the decision fundamentally alters the balance of interests struck by Congress, review is essential to determine whether the Congressional purposes underlying the legislation yield to the interests of bankrupt employers in time of financial uncertainty.

ARGUMENT

Through the provisions of the Single Employer Pension Plan Amendments Act of 1986, Pub. L. No. 99-272, title XI, 100 Stat. 237 (1986) (SEPPAA), Congress balanced the competing interests of the termination insurance system administered by the PBGC, the plan participants of single-employer defined benefit plans, and the employers

[1]After notices of appeal from the district court decision were filed by the PBGC and Miller and Shaffer, the district court certified a class of participants in the Jones and Laughlin Retirement Plan.

sponsoring those plans. The termination insurance system, because it benefits all plan participants, was accorded special protection by Congress. Section 4042, 29 U.S.C. §1342 (1982 and Supp. IV 1986) authorizes the PBGC to involuntarily terminate a plan when the PBGC determines that continuation of the plan threatens the long-run financial integrity of the termination insurance system. 29 U.S.C. §1342(a)(4). The PBGC may involuntarily terminate a plan even though the financial hardship confronted by the employer is not sufficiently severe to qualify for distress termination under Section 4041, 29 U.S.C. §1341(b). Absent a determination by the PBGC that the financial viability of the insurance system requires involuntary termination, Congress declared that the PBGC was "to encourage the maintenance and growth of single-employer defined benefit plans" and was "to increase the likelihood that participants and beneficiaries . . . will receive their full benefits." 29 U.S.C. §1001b(c)(2) and (3). Under the legislation, the Congressional preference for plan participants yields to the interests of employers only in cases of severe hardship. 29 U.S.C. §1001b(c)(4). The insurance system must absorb the unfunded liabilities and the plan participants must accept benefit payments at guarantee levels only when the employer satisfies the distress criteria of Section 4041(c)(2)(B)(ii) and (iii), 29 U.S.C. §1341(c)(2)(B)(ii) and (iii).

The PBGC's petition describes the perceived imminent threat to the termination insurance system that prompted the PBGC to seek involuntary termination in January 1987. Equally true the PBGC demonstrates that the perceived threat to the pension insurance system dissipated with time and events such that in September 1987 the PBGC determined that restoration under Section 4047

was appropriate. Once the PBGC concluded that the threat to the insurance system had abated, the operative Congressional policies mandated restoration by the PBGC. The employer could not satisfy the distress criteria necessary for voluntary distress termination. *See* AR 407-10. Because the plans could not be voluntarily terminated by the employer, interests of plan participants were to be furthered by restoring the plans.

The Court of Appeals' decision undermines that policy and elevates the employer's interest over that of plan participants in the context of restoration. The requirement placed on the PBGC to demonstrate long term financial stability before restoration of a terminated plan shifts the burden Congress assigned to the employer in the distress provisions.

Not only does the decision impair the PBGC's administration of the pension insurance system, but it relegates plan participants to a position subservient to the employer. The decision of the Court of Appeals minimizes the interests of plan participants that Congress plainly sought to protect. Rather than require the employer ineligible for distress termination to continue a pension plan during a period of financial uncertainty, plan participants must suffer the loss of promised pension benefits until the PBGC establishes that it is certain the employer will be able to fund the plan into the foreseeable future. The decision is thus fundamentally at odds with the clearly articulated Congressional policy requiring the employer to fulfill pension promises to plan participants until the employer demonstrates the severe hardship necessary for distress termination.

CONCLUSION

The PBGC's petition for certiorari should be granted.

Respectfully submitted

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